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QUESTION OF THE HUMAN RIGHTS OF ALL PERSONS SUBJECTED TO ANY FORM OF DETENTION OR IMPRISONMENT

Right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms

Report of the Secretary-General prepared pursuant to Commission resolution 1995/34

Addendum

The present report contains a summary of information submitted by the Governments of Cyprus and the United States of America

Cyprus

[Original: English]
[21 December 1995]

No ad hoc legislation regarding restitution, compensation and rehabilitation of victims of grave violations of human rights has been adopted or is in the process of being adopted in Cyprus, the reason being that no problem of such violations exists or can be envisaged in Cyprus. This applies to the area under the de jure and de facto control of the Government of Cyprus. In the part of Cyprus which is under the occupation of Turkey, no measures for restitution, compensation and rehabilitation of the victims at any time during the period of the violations, i.e. the last 20 years, have yet been taken by Turkey, and there is no indication that such measures are to be taken in the future.

GE.96-10281 (E)

United States of America

[Original: English]
[5 January 1996]

Summary

1. The United States Constitution, and the constitutions of the several states and other constituent units, set forth essential guarantees of fundamental rights generally paralled to those set forth in the International Covenant on Civil and Political Rights. There is no single statute or mechanism by which fundamental freedoms are guaranteed or enforced in the United States legal system. Rather, domestic laws provide extensive protection through enforcement of constitutional provisions and a variety of statutes which typically provide for judicial and/or administrative remedies. This reply presents federal statutes already enacted. Because of their large number and variety, legislation of the several states of the union and pending federal legislation are not covered.

General legislation

2. The strong commitment of the United States to the restitution, compensation and rehabilitation of victims of grave violations of human rights and fundamental freedoms is reflected in the United States Constitution and in several important federal statutes. This legislation primarily applies to violations occurring within the jurisdiction of the United States. The relevant statutes safeguard the fundamental rights of people in the United States in accordance with the tenets of the United States Constitution. A more detailed analysis of these and other relevant laws is set forth in the initial report of the United States of America to the Human Rights Committee under the International Covenant on Civil and Political Rights (CCPR/C/81/Add.4, 24 August 1994).

United States Constitution

3. To the extent that gross violations of human rights or fundamental freedoms constitute violations of rights, privileges, or immunities secured by the United States Constitution, victims of such violations within the jurisdiction of the United States may obtain compensation for their injuries by suing the responsible government officers directly under the provisions of the Constitution. See Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971); Davis v. Passman, 442 U.S. 228 (1979). Moreover, because human rights violations contemplate government action or action under colour of law, victims of such violations also have statutory causes of action.

Civil Rights Act of 1871

4. Principal among federal civil rights laws aimed at redressing violations of fundamental rights and freedoms is 42 U.S.C. 1983, which states:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage of any state or territory or the District of Colombia subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

5. Actions "under color of state law," within the meaning of Section 1983, may be perpetrated by federal, state, or local officials. However, some officials, such as judges, enjoy either absolute or qualified immunity. Bradley v. Fisher, 80 U.S. 335 (1972). Other officials enjoy qualified immunity only. Generally, prosecutors enjoy absolute immunity from suit for their involvement in the judicial phase of the criminal process but are afforded only qualified immunity for law enforcement functions. Burns v. Reed, 500 U.S. 478 (1991). Such immunity will not be afforded where an official has violated clearly established statutory or constitutional rights under circumstances in which a reasonable person would have known of the existence of the rights and of the violation. Harlow v. Fitzgerald, 457 U.S. 800 (1982).

6. Section 1983 is invoked in private suits before the United States courts. Situations giving rise to Section 1983 actions include claims by prisoners that they have been subjected to cruel or unusual punishment, in violation of the Eighth Amendment; claims by arrested individuals that law enforcement officers used excessive force, in violation of the Fourth Amendment; and claims by individuals that state or local authorities have denied them equal protection of the laws, in violation of the Fifth and Fourteenth Amendments, through some form of arbitrary discrimination. The most common relief under Section 1983 is money damages, subject to the limitations of official immunity. Injunctive relief is also available and is widely used to provide relief under Section 1983.

7. Conspiracies to deny human rights and fundamental freedoms, apart from being punishable by criminal sanctions, may be redressed by civil suits for damages under 42 U.S.C. 1985. Where the right is one enumerated in the Constitution as being secured only from "state action", there must be official actors in the conspiracy. Brotherhood of Carpenters and Joiners of America, Local 610, AFL-CIO v. Scott, 463 U.S. 825 (1983).

8. In addition to these federal remedies, the several states of the union have their own laws and judicial procedures by which official action may be challenged and compensation or other relief sought.

Federal Tort Claims Act

9. Another statutory remedy for violations of certain constitutional rights by governmental entities is provided by the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346 (b), 2671 et seq., and analogous state tort claim statutes. The FTCA waives the sovereign immunity of the United States with respect to certain torts. "Discretionary" acts and many "intentional" torts are not included, but the statute does waive the sovereign immunity of the United States with respect to claims arising out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution, based on the acts or omissions of "investigative or law enforcement officers" of the United States Government. The act defines an "investigative or law enforcement officer" as an officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of federal law. This definition may include Department of Defense personnel acting in a law enforcement capacity.

Civil Rights of Institutionalized Persons Act

10. Under this statute, codified at 42 U.S.C. 1997, the Attorney-General of the United States may initiate civil actions when there is a reason to believe that a person, acting on behalf of a state or local government, has subjected an institutionalized person to "egregious or flagrant conditions which deprive such persons of any rights, privileges or immunities secured or protected by the Constitution or laws of the United States". Equitable relief provides the appropriate remedy in such suits.

Equal Access to Justice Act

11. The Equal Access to Justice Act, 28 U.S.C. 2412, allows a federal court to award costs and reasonable attorney's fees and expenses necessary to bring a suit for violation of civil rights. However, an award is made only where the court finds that the United States Government has, in fact, violated the individual's civil rights.

Criminal remedies

12. In addition to the civil remedies noted above, federal, state and local officials, we well as private persons, who violate the rights of others, may be subject to prosecution under a host of federal and State criminal statutes (for example, for murder, rape, assault, abduction, etc.). United States Department of Defense personnel may also be subject to criminal prosecution under the Uniform Code of Military Justice, 10 U.S.C. 801-946. The primary authority for federal criminal prosecution of human rights violations is found in 18 U.S.C. 241 and 242. Sections 241 and 242 provide a criminal analog to Sections 1983 and 1985, and allow the Attorney-General to prosecute individuals who violate fundamental rights under colour of law.

Legislation related to international law

Alien Tort Claims Act

13. The Aliens Tort Claims Act of 1789 ("ATCA"), 28 U.S.C. 1350, represents an early effort by the United States Government to provide a remedy to individuals whose rights have been violated under international law. The ATCA provides that "the district courts shall have original jurisdiction in any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States".

14. Only aliens (non-United States citizens) may sue under the ATCA. The jurisdiction of the district courts to hear ATCA claims is limited by the constitutional requirements that the court obtain proper personal jurisdiction over the defendant: the perpetrator of the violation must be present within the territorial jurisdiction of the court or be subject to the court's long-arm jurisdiction.

15. This statute was originally enacted to provide a remedy to individuals who suffered a "tort" at the hands of privateers seeking prize money under the law of admiralty. More recently, it has been applied to cases of human rights violations. See Filartiga v. Pena-Irala, 630 F.2d 774 (2d Cir. 1980).

Torture Victims Protection Act

16. The Torture Victims Protection Act of 1991 ("TVPA") 28 U.S.C. 1350 note, complements the ATCA. See H.R. Rep. No. 367, 102d Cong. 2d Sess. 4 (1992). While the ATCA only provides a remedy to foreign nationals, the TVPA allows both foreign nationals and United States citizens to sue for damages any individual who engages in torture or extrajudicial killing under "actual or apparent authority, or under color of law of any foreign nation. See Filartiga v. Pena-Irala, 630 F.2d 774 (2d Cir. 1980). However, foreign Governments are protected from suit in the United States by the Foreign Sovereign Immunities Act of 1976 and the Act of State Doctrine.

Anti-terrorism Act

17. In addition to imposing criminal sanctions on international terrorists, the Anti-terrorism Act, 18 U.S.C. 2331 et seq., provides that victims of international terrorism may seek compensation for terrorist acts. Section 2333 allows any United States national injured in his or her person or property by international terrorism, or that person's heirs or survivors, to sue in a United States district court for damages. The Act provides for treble damages and litigation costs, including attorney's fees, to be awarded to successful claimants.

18. The statute also provides that any final judgement in the United States or in a foreign State in favour of the Government in a criminal proceeding against the alleged perpetrator on the same facts estops the defendant in a civil proceeding brought under 18 U.S.C. 2331 from denying the essential allegations made by the plaintiff in the civil proceeding.

Specific cases of restitution or compensation

19. The United States has also taken the initiative to provide compensation for past wrongs committed by the Government, even when the victim does not technically have a cause of action. For example, where times of crisis have resulted in a failure of the constitutional and legislative checks on government power, the United States has shown a willingness to compensate for wrongs done. Examples of these, include the following.

Radiation experiments

20. In December 1993, it became widely known that between 1944 and 1974, the United States Government conducted and sponsored a number of experiments involving exposure of humans to radiation. The United States Government has undertaken to examine the propriety of these experiments and to make public as much information about these experiments as possible. The President established an advisory committee on human radiation experiments under a January 1994 executive order. The United States Congress and the executive branch are currently considering the extent to which compensation may be appropriate in various cases. Individual and class-action lawsuits are also pending in some cases, most of which have been brought under the Federal Tort Claims Act, discussed above.

Japanese internment restitution

21. During the Second World War, the United States evacuated many Americans of Japanese origin from the west coast and relocated them to internment camps. In recent years, the United States Government has acknowledged that, while these measures may have resulted from legitimate concerns of national security, the evacuation and internment violated the civil rights of these American citizens. Accordingly, the United States Government has undertaken to provide restitution to those injured as a result of internment. Under Section 105 of the Civil Liberties Act of 1988, the United States Government must provide redress to American citizens and permanent resident aliens of Japanese ancestry who were forcibly evacuated, relocated, and interned by the United States Government during the Second World War.

Conclusion

22. Grave violations of human rights and fundamental freedoms are prohibited and strictly punished in the United States. The laws of the United States and the several states of the union provide many avenues for restitution, compensation and rehabilitation for those who have fallen victim to grave violations of human rights or fundamental freedoms either in the United States or abroad.

23. The Government of the United States remains committed to the eradication of grave violations of human rights and fundamental freedoms all over the world and to the promotion of the rights of victims of such violations to restitution, compensation and rehabilitation.

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Addendum

The present addendum contains a summary of information submitted by the Governments of Romania, Togo and the United Kingdom of Great Britain and Northern Ireland.

ROMANIA

[Original: English]
[5 March 1996]

The Romanian Constitution sets out an extensive list of human rights and fundamental freedoms, including a series of provisions that are most relevant for the issue of the right to restitution, compensation and rehabilitation for victims of grave violations of human rights, as addressed in Commission resolution 1995/34.

The substantive provisions of the Romanian Constitution, which constitute the basic legal prerequisites for the exercise of the right to restitution, compensation and rehabilitation, are as follows:

Article 22

"(1) The right to life, as well as the right to physical and mental integrity of person, are guaranteed.

"(2) No one may be subjected to torture or to any kind of inhuman or degrading punishment or treatment".

Article 23

"(1) Individual freedom and security of person are inviolable.

"(2) Search, detainment or arrest of a person shall be permitted only in the cases and under the procedure provided by law".

Article 30

"(1) Freedom of expression of thought, opinion or belief ... by words, in writing, in pictures, by sound or other means of communication in public is inviolable.

"(6) Freedom of expression shall not be prejudicial to the dignity, honour, privacy of person and the right to one's own image".

In the same respect, the Romanian Constitution guarantees the right to defence (art. 24), personal and family privacy (art. 26), the inviolability of domicile (art. 27) and the protection of private property (art. 41).

Within the constitutional corpus of human rights and fundamental freedoms, the right of petition, as provided in article 47, holds a particular position:

"(1) Citizens have the right to apply to the public authorities by petitions formulated only in the name of the signatories.

"(3) The exercise of the right to petition shall be tax-exempt.

"(4) The public authorities are bound to answer to petitions within the terms and under the conditions established by law".

The right to restitution is expressly provided in article 48:

"(1) Any person aggrieved in his legitimate right by an administrative act or failure of a public authority to solve his application within the legal term is entitled to the acknowledgement of his right, ... of the act and remedies for damage.

"(3) The State bears patrimonial liability, according to the law, for damages caused by judicial errors in criminal cases".

However, the entire list of human rights guaranteed by the Romanian Constitution is to be interpreted in accordance with the general principles provided therewith, particularly, those stipulated in articles 20 and 21:

Article 20

"(1) Constitutional provisions concerning citizens' rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties to which Romania is a party.

"(2) Where any inconsistencies exist between the covenants and treaties on fundamental rights to which Romania is a party and internal laws, the international regulations shall take precedence".

Article 21

"(1) Every person is entitled to bring cases before the courts for the defence of his legitimate rights, liberties and interests.

"(2) The exercise of this right may not be restricted by any law".

The Romanian legislator's legal approach to the issue of the right to restitution, compensation and rehabilitation is, furthermore, extended through a series of provisions of organic and ordinary laws.

Thus, when incriminating offences that constitute grave violations of human rights and fundamental freedoms, the Romanian Penal Code also stipulates the right of victims of such violations to sue for civil injury against the offender or the person considered as responsible for the damage, according to the law.

More specific references are to be found in the provisions of articles 14, 21 and 506 of the Code of Penal Procedure:

Article 14

"Restoration of damage is made in accordance with the provisions of the civil law:

'(a) In kind, return of goods by enforcing the principle of restitutio in integrum, by the complete or partial annulment of an act or by any other means of restoration;

'(b) Alternative pecuniary compensation. Pecuniary compensation is also provided for the damages produced by the loss of possession'".

Article 21

"The civil appeal can be initiated or pursued by the successors when, according to the Court's final decision of retrial, it was established that the offence did not exist or that the person was innocent.

"This right attends to the person against whom preventive measures (preventive arrest, interdiction to leave the locality) were imposed and who was, subsequently, and for the reasons provided in the previous paragraph, acquitted or in respect of whom the accusation was dismissed (...)".

Article 506

"The person who is entitled to public compensation can address the Court ...

"The State is represented by the Ministry of Finance".

Law No. 29.1990 on administrative disputes provides in article 1 that: "the person aggrieved in his legitimate right by an administrative act or failure of a public authority to solve his application regarding a legitimate right is entitled to address the competent Court for the annulment of the act, the acknowledgement of his right and compensation for the damages thus produced".

Furthermore, according to article 11 of the same law, "the Court will also decide upon the material and moral compensation".

Although the right to rehabilitation is not expressly provided by law, Romanian jurisprudence has developed a particular legal framework in this regard.

Thus, considering the right for total compensation regarding material and moral damages as a consequence of grave violations of human rights, the victim is entitled to request:

(a) Pecuniary compensation during medical treatment, recovery or a requalification period;

(b) Pecuniary compensation for loss of possession during imprisonment or infirmity or for moral damages, including rehabilitation and social reintegration.

TOGO

[Original: français]
[8 mars 1996]

Le Gouvernement togolais se réjouit de l'adoption de cette importante résolution qui vient renforcer les efforts constamment menés par la communauté internationale pour garantir effectivement les droits de l'homme et les libertés individuelles et collectives.

Il convient de souligner, en ce qui concerne le Togo, que des événements malheureux et regrettables ont eu lieu pendant la transition, période au cours de laquelle la situation politique togolaise était particulièrement troublée et agitée.

Dans cette confusion généralisée, l'Etat avait perdu certaines de ses prérogatives : le gouvernement était impuissant à faire réprimer les actes délictuels ou criminels qui émaillaient cette période et la justice était loin de disposer des moyens d'agir.

Ainsi, pour renforcer la protection des droits de l'homme, des instructions ont été données aux magistrats du parquet et aux officiers de police judiciaire pour le respect scrupuleux de la procédure pénale.

En outre, le gouvernement s'est largement apesanti sur la manière de gérer les différents cas nés des troubles sociopolitiques.

Aussi, face à tous les cas de violations des droits de l'homme générés par la haine et les règlements de compte, le Gouvernement togolais, après mûres réflexions, a-t-il jugé indispensable d'offrir au peuple togolais l'opportunité de se pardonner afin de susciter la réconciliation nationale et instaurer l'apaisement général.

C'est dans cet esprit que le gouvernement a fait adopter, le 15 décembre 1994, une loi d'amnistie et a signé, le 12 août 1995, un accord avec le Haut Commissariat des Nations Unies pour les réfugiés en vue du rapatriement volontaire des réfugiés togolais.

Toujours dans l'optique de la réconciliation nationale, le gouvernement a entrepris une série d'actions visant à prendre en considération la question du droit à restitution, à indemnisation et à réadaptation, qui constitue la préoccupation essentielle de cette résolution.

La création d'un ministère des droits de l'homme et de la réhabilitation participe aux actions conçues à cette fin.

Au sein de ce département, il est envisagé la création d'une direction de la réhabilitation, qui serait chargée de la conception, de l'animation et du contrôle de toutes les activités devant concourir à la résolution du problème des victimes des troubles sociopolitiques.

Il est prévu, au sein de cette direction, la création de deux divisions, à savoir : la division de la législation et de la réglementation qui devra veiller à l'adoption de mesures d'ordre législatif, réglementaire et judiciaire relatives à la réhabilitation des victimes des troubles sociopolitiques et la division de la logistique dont les attributions sont orientées vers la mise en oeuvre de moyens indispensables à la réinsertion et au dédommagement progressif des victimes des troubles sociopolitiques.

Par ailleurs, il convient de préciser que des dispositions concrètes sont en train d'être prises pour assurer à tous les citoyens une égale protection devant la loi.

Il s'agit notamment de l'indépendance de la magistrature et de la mise en place de la cour constitutionnelle et autres juridictions non moins importantes.

Voici autant de mesures envisagées que le Gouvernement togolais estime nécessaires pour assurer véritablement la garantie effective du droit à restitution, du droit à indemnisation et du droit à réadaptation des victimes de violations des droits de l'homme.

Aussi, le Gouvernement togolais réitère-t-il, avec intérêt, sa pleine adhésion aux initiatives pertinentes figurant dans cette résolution.

Il exhorte en conséquence la Commission à intensifier ses actions en vue d'amener les Etats à renforcer leur législation interne dans ce domaine pour une meilleure garantie des droits des victimes de violations graves des droits de l'homme.

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

[Original: English]
[12 February 1996]

The law of the United Kingdom does not treat "grave violations of human rights" as constituting, as such, a distinct category of unlawful acts and therefore does not make specific provision for the award of compensation, etc. in such cases. However, that does not at all mean that, in what must be regarded as the purely hypothetical situation in which such a violation was committed in the United Kingdom, the victim would be unable to obtain compensation.

The report of the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, from which the relevant provision of resolution 1995/34 derived, identified grave violations of human rights as involving the following: Genocide; slavery; summary executions; torture; enforced disappearances; arbitrary and prolonged detention; deportation or forcible transfer of population; or systematic discrimination. It can confidently be said that none of these violations of human rights takes place in the United Kingdom.

However, all of the acts of practices involved, if they ever did occur, would be unlawful, and most of them, as well as giving rise to a civil right to compensation (damages for tort), would also involve the commission of crimes. For example, both genocide and torture have expressly been made criminal offences for which severe penalties may be imposed (pursuant to the Genocide Convention and the Convention against Torture, respectively), while arbitrary detention and summary execution would be offences under the ordinary criminal law. The Criminal Injuries Compensation Scheme, which was introduced in 1964, provides for the payment of compensation out of public funds to the blameless victims of violent crimes. As regards systematic discrimination, there is provision in both the legislation which deals with discrimination on grounds of sex (the Sex Discrimination Act 1975, as amended) and the legislation which deals with discrimination on grounds of race, etc. (the Race Relations Act 1976, as amended) that enables persons who claim to be the victims of such discrimination to apply to a tribunal or, in some cases, to a court for the award of compensation.